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IN THE

Supreme Court of the United States

October Term, 1965

No. ~~1400~~ 227

CORINTH PUBLICATIONS, INC.,

Petitioner,

vs.

JAMES P. WESBERRY, HUBERT L. DYAR and MARCUS CALHOUN, as Members of the Georgia State Literature Commission,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Georgia.

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IN THE

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CORINTH PUBLICATIONS, INC.,

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JAMES P. WESBERRY, HUBERT L. DYAR and MARCUS CALHOUN, as Members of the Georgia State Literature Commission,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Georgia.

Petitioner Corinth Publications, Inc. prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Georgia, entered in the above entitled case on January 18, 1966.

Opinions Below.

The opinion of the Supreme Court of the State of Georgia [R. 382-391] is reported in 146 S.E. 2d 764. A copy of the opinion is printed in Appendix A hereto. No written opinion was rendered by the Judge of the Superior Court of Muscogee County, Georgia.

Jurisdiction.

The judgment of the Supreme Court of the State of Georgia [R. 392] was entered on January 18, 1966.

The said judgment is printed in Appendix B hereto. By order of Mr. Justice Black, dated April 12, 1966, the time to file this petition for a writ of certiorari was extended to and including June 16, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Questions Presented.

1. Whether the Georgia statutes (Ga. L. 1953, pp. 135-136, Ga. L. 1958, pp. 391-394, Ga. L. 1964, pp. 161-164, Ga. Code Ann. 26-6301a to 6309a), on their face and as construed and applied, by reason of the absence of a provision for a jury determination of obscenity, and by reason of the denial of such jury determination in the case herein despite petitioner's requests duly made, render the statutes unconstitutional because the statutes, on their face and as so construed and applied, abridge petitioner's exercise of freedoms of speech and press, arbitrarily deprive petitioner of its liberty and property without due process of law, and discriminatorily deny petitioner the equal protection of the laws, contrary to the free speech and press, jury trial, due process and equal protection provisions of the First, Seventh and Fourteenth Amendments to the United States Constitution.

2. Whether the book *Sin Whisper* by Alan Marshall is entitled to the protections of the free speech and press provisions of the First and Fourteenth Amendments, and whether the Georgia statutes (Ga. L. 1953, pp. 135-136, Ga. L. 1958, pp. 391-394, Ga. L. 1964, pp. 161-164, Ga. Code Ann. 26-6301a to 6309a), as construed and applied to authorize the suppression of the said book under impermissible constitutional standards for judging obscenity, render the statutes uncon-

stitutional, and arbitrarily deprive petitioner of its liberty and property without due process of law and abridge petitioner's exercise of freedoms of speech and press, contrary to the provisions of the First and Fourteenth Amendments to the United States Constitution.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Seventh and Fourteenth Amendments to the Constitution of the United States and the pertinent provisions of the Georgia Laws (Ga. L. 1963, pp. 78-79, Ga. L. 1965, pp. 488-489, Ga. Code Ann. 26-6301, 6301.2; Ga. L. 1953, pp. 135-136, Ga. L. 1958, pp. 391-394, Ga. L. 1964, pp. 161-164, Ga. Code Ann. 26-6301a to 6309a; Ga. L. 1876, p. 105, Ga. Code Ann. 37-1104; Ga. L. 1945, p. 137, Ga. L. 1959, pp. 236, 237, Ga. Code Ann. 110-1101 to 1103) are printed in Appendix C hereto.

Statement of the Case.

This action was instituted by the filing of a petition [R. 3-5] in the name of the respondents James P. Wesberry, Hubert L. Dyar and Marcus Calhoun, in their official capacities as members of the Georgia State Literature Commission. The petition sought a declaratory judgment pursuant to the provisions of the Georgia laws creating the State Literature Commission. The action was directed against and named as defendant a book entitled *Sin Whisper* by Alan Marshall, published by the petitioner herein [R. 3]. The petition alleged that the Commission had found the book to be obscene [R. 3-4] in that the book contained allegedly obscene and repugnant passages devoted to lengthy and vivid accounts of preparation for and acts of "sexual promiscuity and misbehavior between its main characters"

[R. 4]. The petition contained a prayer for hearing and adjudication that the book was obscene [R. 4-5]. Annexed to the petition and designated as Exhibit "A" was a copy of the book [R. 17-207]. By order dated July 28, 1965, the Honorable J. Alvin Davis, a Judge of the Muscogee Superior Court, finding that there was probable cause to believe that the book was obscene, ordered the book and all respondents named in the petition to appear for a special hearing to determine whether the book is obscene and should be so declared [R. 6].

How Federal Questions Are Presented.

A. On August 30, 1965, petitioner herein appeared and demurred to the petition filed by the State Literature Commission, and moved to dismiss the said petition upon the grounds generally that the Georgia statutes defining obscenity were unconstitutional in violation of the First and Fourteenth Amendments [R. 7-9]. On the same day, the petitioner herein also filed its answer and plea in bar to the petition of the Commission alleging, among other things, that the book *Sin Whisper* is not obscene under Georgia law; that if the Georgia Laws relating to obscenity were construed as applicable to the said book then the Georgia Laws, as construed and applied, would violate the provisions of the First and Fourteenth Amendments to the Constitution of the United States [R. 10-13]. In addition, and on the same day, the petitioner herein filed a demand for a jury trial in the case [R. 14].

On September 16, 1965, the cause came on for hearing before the aforesaid Honorable J. Alvin Davis. At the outset, counsel for petitioner herein placed into the record "the constitutional issues that we raised with regard to the jury trial" [R. 213]. Since the said Judge

had ruled that the case did not have to be submitted to a jury and would have to be tried before him alone [R. 213], counsel urged again that the statute "contemplates a jury trial; that the Constitutions of the United States and of Georgia require a jury trial because the free speech provisions would be impinged by a ruling that the book is obscene; and that the due process clauses of the two Constitutions would be violated by a non-jury decision since the result of a finding of obscenity is suppression of the book and a deprivation of the property of the publisher and perhaps of others, as a result of the decision, since the book cannot circulate" [R. 214].

It having been stipulated by counsel that Exhibit "A" annexed to the petition was the book in question in the case [R. 214], the State Literature Commission called as its first witness Hubert L. Dyar [R. 214], one of the respondents herein and the Executive Secretary of the Commission. The witness testified that his impression of the book was "that it's a story of a lonely boy, I believe he was stationed in the Army, or with the Army, and in a large city" [R. 219]. The witness testified that some of the scenes in the book described "illicit sex" [R. 221]. The witness stated that in his opinion the book was obscene under Georgia law [R. 226].

On cross-examination, the witness stated that the book did tell a story, albeit a limited one; that the book did deal with the problems of a lonely serviceman; that the loneliness stemmed from the lack of a normal childhood because of the death of his parents and the denial of love and affection from his foster parents [R. 228-229]. The witness conceded that it was possible to read

the story contained in the book as demonstrating that the serviceman wrongly sought to cure his loneliness through sex, and tried in the wrong way to establish contacts with women [R. 231].

The witness affirmed that he had read the books *Madam Bovary* and *Lady Chatterley's Lover* and that both of the said books dealt with illicit sex [R. 235-236]. The witness stated that the Commission had not instituted any action against *Madam Bovary* but had made a determination that *Lady Chatterley's Lover* was obscene and contemplated proceedings against the book [R. 236-237]. The witness also conceded that the descriptions contained in the book *Sin Whisper,* which he had described as "vivid", were not as vivid as those contained in *Tropic of Cancer* [R. 237-246]. The witness also conceded that scenes described in *Lady Chatterley's Lover* were more specific than those contained in the book herein involved [R. 247-253].

The witness stated that in his opinion the book *Sin Whisper* did not have any "new, original, or significant" ideas [R. 260]. The witness conceded that one moral of the story contained in the book was that the search to solve an emotional problem may not always be by sexual experiences and may, in fact, lead to self-destruction [R. 261]; that one cannot find happiness in life through sexual promiscuity [R. 261]. The witness admitted that these were important ideas, "but not original to the author of this book" [R. 261].

The Commission called Dr. Charles J. Granade [R. 263]. The witness stated that in his opinion the book was obscene [R. 265]. The witness stated that the redeeming feature of the book was "very weakly inclined" [R. 267]. It appeared to the witness that the book did

not go into the life of the primary character of the writing with sufficient depth [R. 266]. The witness could not find any "enlightening, different, beneficial" value in the book [R. 267].

On cross-examination, it appeared that the witness had studied for the ministry [R. 269] and majored in the area of school administration [R. 270] and, at the time of testifying, the witness was a "full-time minister" [R. 271]. The witness stated that he did quite a bit of reading but, of the ten bestsellers then being read by the community at the time the witness testified, the witness had read none [R. 271-272]. In the last two weeks, the witness stated that he had read the book herein involved and the *Gospel of John* [R. 272]. The witness had published articles in church administration in the "Christian Index", in "Church Musician" and in "Home Life" magazine [R. 273]. In the witness' opinion, he was "better qualified" to read and understand what contemporary standards are than the average reader [R. 274].

The witness stated that he was not familiar with the standards set forth in the Georgia Laws with respect to the obscenity of writings nor had such standards been read to him [R. 280]. He could not recall the title or author of any fictional work that he had read in the last six months or year [R. 281]. He stated that he read "all of the condensed books appearing in Readers Digest" but he could not recall a single title [R. 281]. Since the witness was unfamiliar with the statutory standards for judging obscenity, he affirmed that he had applied the standards of "the boundaries of decency and good taste" [R. 282].

The Commission called Mrs. Dorothy B. Hatfield [R. 285]. The witness had just "glimpsed" a definition of the word "obscenity" under Georgia law before she took the stand [R. 287]. In her opinion, the book involved was obscene [R. 287] because it tended "to stir the sexual impulses and stimulate lustful thought" [R. 288]. The witness stated that the sexual experiences in the book were described with emphasis on "the sensual" instead of emphasis on "the sexual aesthetically or as arousing the aesthetic emotions in the characters" [R. 288]. The witness stated that she could not place the novel here involved in any "accepted" terms prescribed by "qualified literary critics" [R. 289].

On cross-examination, the witness stated that the book was "poorly written" [R. 294]. The witness herself had been writing fiction since 1953, but she had submitted nothing [R. 295]. The witness stated that she had read the poem "Christabel" by Coleridge but, when reminded that the poem contained lesbian scenes, she stated that she had no recollection of the poem [R. 297-298]. She did not read anything by Henry Miller and wondered if he had written "Death of a Salesman" [R. 298]. The witness had read *Sin Whisper*, the book involved herein, the day before she testified and found it "boring" [R. 304]. The witness conceded that it was possible that she was employing a standard of judgment with respect to the book which might be different from those employed by persons who were not well educated or well read [R. 306]. The witness stated: "This book is not literature in that literature is a writing, literature is a writing that employs a form of excellence in the expression of ideas that have some permanent or universal truth" [R. 313].

The witness stated that her understanding of the statutory definition of "obscene" was a writing that was "shameful, dealing with sex, dealing with nudity" [R. 314]. The book did not appeal to the witness' prurient interest; it was simply repetitious [R. 315]. The witness did not know "what appeals to anybody else" [R. 316]. The witness equated limits of candor with "social mores" [R. 316], and stated that "mores" are those things which are not "taboo in our society" [R. 317]. Questioned as to her knowledge of contemporary standards of candor, the witness stated: "I just said I didn't know the other books, sir" [R. 319]. In the view of the witness, the word "normal" can be defined as "the practice of the majority" [R. 319], while the word "abnormal" may be defined as "the practice of a minority". [R. 319-320].

Thereupon, the Commission rested its case.

On behalf of petitioner herein, there was testimony by Louis D. Becker [R. 320]. The witness received a Bachelor of Science in English and Secondary Education from the University of Wisconsin; and a Master of Arts in English at Marquette University. He had studied at the Shakespeare Institute in England, and was presently teaching at Emory University [R. 321]. The witness had taught American Literature for eleven years from high school to college levels.

The witness stated that he was familiar with the statutory definition of "obscenity" and that he had read the book *Sin Whisper* [R. 322]. In the opinion of the witness, the book was not obscene [R. 322]. He had read *Lady Chatterley's Lover, The Thief's Journal* and *Our Lady of the Flowers* by Genet, and also had read *Candy, Tropic of Cancer, Juliette* by Marquis deSade,

and Hubert Selby's *Last Exit to Brooklyn*. All of these books he had purchased in a bookstore in Atlanta [R. 323]. He had seen these books in Columbus, Georgia and they were also in the Emory Library [R. 324]. He had also picked up a copy of *Ulysses* in the Public Library in Decatur [R. 324].

The witness testified that the book *The Thief's Journal* was substantially devoted to the homosexual and other "abnormal" activities of the author, described in detail [R. 325]: In similar fashion, the book *Juliette* by DeSade dealt extensively with descriptions of flagellation and masochism [R. 325-326]. Other books available in Columbus, Georgia included such books as *East of Eden*, by John Steinbeck, a Nobel Prize winner, the main character of the book being a prostitute engaged in adventures in a house of ill-repute with various males interested in masochism in different forms [R. 327]; *Making Do* by Paul Goodman, dealing with descriptions of sexual activities by socially dislocated people searching for identity [R. 327-329]; *Tropic of Cancer*, dealing with a recital of sexual experiences of a man moving through his life in a given time span, with no ordinary plot discernible [R. 329]; *Last Exit to Brooklyn*, dealing with young people in the lower socio-economic scale, in a series of candid sexual episodes or incidents which occur in their lives [R. 329-333]; *Room at the Top*, dealing with a lower middle-class Englishman who rises into a partnership in a company after pre-marital relations with the daughter of the owner of the company [R. 333]; and *Candy*, which goes from sexual episode to sexual episode, including so-called abnormal sex throughout the writing [R. 334-335].

The witness testified that the book *Sin Whisper* involved herein is the least explicit of all of the aforesaid writings; that the book is in the tradition of American literature, in that it describes a search for identity which forms the theme for much of American literature [R. 335]. The witness stated that he had read a considerable range of such books differing in degrees of literary excellence, and that the book herein involved and the problem of the young soldier is part and parcel of the same search for identity [R. 335-336]. The witness testified that the book had value [R. 336], and that compared with many other writings generally accepted in the community [R. 339-342] the book *Sin Whisper* was much less explicit in the treatment of sex [R. 342].

On cross-examination, the witness stated that it was not true that the book contained detailed sexual descriptions [R. 346-347]. The witness stated that the book had social importance because it emphasized that love and sex are not the same thing; and that many sexual experiences turn out to be disgusting to some people, as they were to the principal character in the book [R. 348]. The witness stated that there was cohesion in the novel herein [R. 349-350], and that many of the books which the witness buys in book stores and obtains in libraries are far more candid than the book *Sin Whisper* [R. 355].

B. No opinion was rendered by the trial judge. The judgment and decree [R. 15-16], entered on September 27, 1965, paraphrasing the language of the petition of the State Literature Commission, found that the book contained lengthy detailed and vivid accounts of preparation for and acts of "normal and abnormal sexual rela-

tions"; that the book has as its predominant appeal "the arousing of prurient interests in the average man of our national community"; that the book has no "redeeming literary or social value or importance"; that the book goes substantially beyond "the customary limits of candor in description and representation of its subject matter"; and that the book, "judged as a whole by Georgia Statutory Standards and Constitutional Standards established by the United States Supreme Court", is obscene [R. 15-16].

On appeal, petitioner herein urged, among other things, that the trial court had erred in denying the demand for a jury trial; had erred in holding that the book was obscene and not entitled to constitutional protection under the provisions of the First and Fourteenth Amendments to the Constitution of the United States; and had erred in holding that the book went beyond customary limits of candor and appealed to prurient interest and was without redeeming literary or social value or importance [R. 377-378].

The Supreme Court of Georgia held that the trial court's denial of the demand for a jury trial was not erroneous; that the right to a jury trial did not exist under the Georgia Constitution, nor was a jury trial required by any of the statutes relied upon by petitioner; nor was a jury trial required either by the provisions of the First, Seventh and Fourteenth Amendments to the Federal Constitution or by the standards for judging obscenity enunciated by this Court (App. A., pp. 4-6). With respect to the book, the Georgia Supreme Court held that the findings and conclusions of the trial judge, as included in the judgment and decree, were "amply supported by the evidence" (App. A., p.

8). The court below added that in its view the book is "filthy and disgusting" (App. A, p. 8), and that further description was unnecessary (App. A., p. 8). The opinion of the Georgia Supreme Court was rendered on January 18, 1966 [R. 382], and the judgment of affirmance [R. 392] was entered on the same day. The petition for a writ of certiorari herein followed.

Reasons for Granting the Writ.

1. (a) The state statute herein involved makes no provision for a jury determination of obscenity. The state courts below have construed the statute as denying petitioner any right to a jury determination. Georgia has devised a statutory procedure which permits a State Literature Commission to obtain a determination that a book is obscene from a single judge. In effect, the state procedure makes it impossible to obtain a jury determination in any civil or criminal proceeding.

Under Georgia law, the State Literature Commission may bring either an action to enjoin the distribution of alleged obscene material (Ga. L. 1953, pp. 135-136; 1958, pp. 391, 393; Ga. Code Ann. 26-6306a), or it may bring an action for declaratory judgment to determine the alleged obscenity of the material (Ga. L. 1964, pp. 161, 162; Ga. Code Ann. 26-6306a.1). Under state law, if the State Literature Commission were to bring an action for an injunction, an interested party could request a jury trial, as was conceded by the court below (Ga. L. 1876, p. 105; Ga. Code Ann. 37-1104; App. A, p. 6). Georgia also provides that in suits for declaratory judgments generally a jury trial may be demanded by an interested party (Ga. L. 1945, p. 137; Ga. Code Ann. 110-1103). But the court below has held that in a declaratory judgment action by the State Lit-

erature Commission to determine the alleged obscenity of a writing, the general statute with respect to declaratory judgments is not applicable and a jury is not required (App. A., p. 5). Thus, the State Literature Commission may arbitrarily select the declaratory judgment device instead of the injunction device in order to deprive an interested party of the right to a jury trial, as was done in the case herein.

Moreover, the state law provides that if there is a determination that a particular writing is obscene as found by a single judge, then "any person to whom such notice is mailed shall be presumed to have knowledge of the obscenity of the literature named" (Ga. L. 1964, pp. 161-162; Ga. Code Ann. 26-6306a.1(f)). For all practical purposes, therefore, issues of obscenity and scienter are decided without a jury trial. See, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58.

The effect of the entire Georgia statutory procedures is to remove the right of jury determination from the area of obscenity in both civil and criminal causes. Whether Georgia statutory procedures thus provide safeguards for freedoms of speech and press for material which is not obscene is a question clearly presented in the case herein and, it is submitted, of great constitutional importance.[1]

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[1]The Georgia statutory procedures appear akin to *in rem* proceedings which are generally instituted for the forfeiture of property. In the federal courts jury trials are ordinarily required as a matter of constitutional right in such proceedings. 5 Moore, *Federal Practice*, §38.31 at 230-231. In *One 1958 Plymouth Sedan v. Commonwealth*, 380 U.S. 693, the Pennsylvania forfeiture proceedings were held to be quasi-criminal in character and governed by the search and seizure provisions of the First and Fourteenth Amendments. In Georgia, under the state procedures in obscenity cases where First Amendment questions are implicated, a jury trial is denied in similar quasi-criminal proceedings.

(b) Members of this Court, it is respectfully submitted, have on various occasions noted the substance and importance of the federal question here presented. Mr. Chief Justice Warren, dissenting in *Times Film Corp. v. City of Chicago,* 365 U.S. 43, observed that the Chicago ordinance, requiring the submission of films for examination by city officials as a prerequisite to the grant of a permit for public exhibition of the films, violated the First Amendment freedoms because, among other things, it failed to provide for a jury determination on the issue of obscenity. "The inexistence of a jury to determine contemporary community standards is a vital flaw" (365 U.S. at 68-69).

Mr. Justice Brennan, dissenting in *Kingsley Books, Inc. v. Brown,* 354 U.S. 437, stated: "The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards. A statute which does not afford the defendant, of right, a jury determination of obscenity falls short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene. . . ." (354 U.S. at 448).

Mr. Justice Douglas' dissent in *Kingsley,* concurred in by Mr. Justice Black, found the statute to transgress constitutional guarantees because, among other things, the statute "substitutes punishment by con-

tempt for punishment by jury trial" (354 U.S. at 447).[2]

(c) It has been constantly affirmed by this Court that the standards for judging the obscenity of writings must safeguard the protection of freedoms of speech and press for material which is not obscene.[3] The power of a State to suppress "obscenity" is limited by the First Amendment protections for freedoms of speech and press. The Constitution, this Court has held, is a barrier to the arbitrary exercise of the power of suppression. A State cannot restrict the dissemination of books which are not obscene, nor is a State free to adopt whatever procedures it pleases for dealing with obscenity without regard to the possible consequences for constitutionally protected speech and press.

As a corollary to the aforesaid general constitutional principles, it has been emphasized that the operation and effect of the method by which speech and press are sought to be restrained must be closely examined and analyzed. *Speiser v. Randall*, 357 U.S. 513, 520. "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seem-

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[2]Mr. Justice Stewart, not a member of this Court when *Kingsley* was decided, stated in *Volanski v. United States*, 246 F. 2d 842 (6 Cir. 1957), as Circuit Judge, that the question of obscenity "is peculiarly one best left for *nisi prius* determination, preferably by a jury" (246 F. 2d at 845).

[3]*Roth v. United States* [*Alberts v. California*], 354 U.S. 476; *Smith v. California*, 361 U.S. 147; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58; *Freedman v. Maryland*, 380 U.S. 51; *A Quantity of Copies of Books, et al. v. Kansas*, 378 U.S. 205; *Jacobellis v. Ohio*, 378 U.S. 184; *A Book etc. v. Attorney General of Massachusetts*, 383 U.S. 413.

ing curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486. As was stated by Mr. Justice Brennan in *Manual Enterprises, Inc. v. Day*, 370 U.S. at 497: "We risk erosion of First Amendment liberties unless we train our vigilance upon the method whereby obscenity is condemned no less than upon the standards whereby it is judged." State statutory procedures which purport to suppress material as "obscene" without a determination by a jury that the material is obscene do not, it is submitted, upon careful scrutiny and analysis provide the necessary safeguards for the protection of nonobscene material under the free speech and press provisions of the First and Fourteenth Amendments.

In *Jacobellis v. Ohio*, 378 U.S. 184, this Court stressed that obscenity is excluded from constitutional protection only if the writing involved is utterly without redeeming social importance; that the writing must, in addition, appeal to the prurient interest of the average person; and that the constitutional status of the material cannot be made to turn on a "weighing" of the social importance of the material against its alleged prurient appeal. Moreover, this Court emphasized that before issues of prurient interest and social importance are reached, it is necessary for the factfinder to initially determine that the material goes substantially beyond customary limits of candor, in the Nation as a whole, in the description or representation of matters pertaining to sex, nudity or excretion. The *Roth* standard, it was held, requires in "the first instance" a finding that the material goes substantially beyond customary limits of candor and, in the absence of such a deviation from "society's stand-

ards", no official inquiry into the other essential elements of obscenity can be squared with the guarantees of the First and Fourteenth Amendments (378 U.S. at 191-192).

Only recently in *A Book etc. v. Attorney General of Massachusetts,* 383 U.S. 413, this Court held that under the *Roth* definition, as elaborated in subsequent cases decided by this Court, "three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value" (383 U.S. at 418).

It follows from all of the aforesaid, it is submitted, that the Fourteenth Amendment does not permit the suppression of a writing unless to average persons, *applying contemporary community standards,* the dominant theme of the material, taken as a whole, appeals to prurient interest and is utterly without redeeming social importance. It is these criteria which a majority of the Court has deemed "adequate to withstand the charge of constitutional infirmity". *Roth v. United States,* 354 U.S. 476, 489. This Court has insisted that no writing under the First and Fourteenth Amendments can be suppressed as "obscene" when such a writing is within customary freedom of expression. "The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates." Mr. Justice Harlan in *Smith v. California,* 361 U.S. 147, 171.

We deal therefore with constitutional standards enunciated by this Court which require a determination

with respect to limits of candor accepted by *the community*; with respect to the importance of a writing to *society*. If the community is to be deprived of the right to read a book or other writing by standards and criteria which are based upon acceptance and toleration of the community and society, it is submitted that only representatives of the community or society should be empowered to make the final and awesome decision of suppression or nonsuppression.

If First Amendment rights are dependent primarily on community and society rejection or acceptance, then, it is submitted, the only method whereby such First Amendment rights can be protected is by assurance that a properly selected jury is empowered to make the initial determination.[4] The rights of books and other forms of expression are "fragile enough" without adding the additional threat of suppression by a single

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[4]The petitioner is urging here that a jury trial is constitutionally required in obscenity actions. Of course, as with jury questions generally, a trial judge must initially determine that there is a jury question; "i.e., that reasonable men may differ whether the material is obscene". Mr. Justice Brennan, dissenting in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 448. But a court cannot instruct a jury that a given writing is obscene as a matter of law, "since elements other than the nature of the material itself enter into the determination, particularly the question of customary freedom of expression". A.L.I. *Model Penal Code*, Tent. Draft No. 6 (May 6, 1957) 47. An appellate court may for similar reasons, reverse an obscenity judgment if a trial court fails to submit a controverted issue of community standards to a jury, but it may also reverse a jury determination if, in the opinion of the appellate court, reasonable men could not differ on the question of a writing being within the customary limits of candor. For a graphic example of these principles, see, *Commonwealth v. Monis*, 336 Mass. 178, 143 N.E. 2d 196 (1957); 338 Mass. 442, 155 N.E. 2d 762 (1959). And since the issue involves factual matters "entangled in a constitutional claim", the appellate courts, and ultimately this Court, may declare the material constitutionally protected despite the jury determination. *Jacobellis v. Ohio*, 378 U.S. 184.

judge without determination by the community or society. See, Mr. Justice Douglas in *N.A.A.C.P. v. Overstreet*, 86 S. Ct. 1306, 1308.

(d) History provides cogent support for the view that the determination of whether or not expression in a writing conforms to the standards of the community must be left to a jury which is chosen from the community. Blackstone stated that "in settling and adjusting a question of fact, when intrusted to any single magistrate, partiality and injustice have an ample field to rage in; either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here therefore a competent number of sensible and upright jurymen chosen by lot from among those of the middle rank, will be found the best investigators of truth and the surest guardians of public justice. . . . Every new tribunal, erected for the decision of facts, without the intervention of a jury, . . . is a step towards establishing aristocracy, the most oppressive of absolute governments." III Blackstone's *Commentaries* 380.

The seditious libel trials of Wilkes, Thomas Paine and the Dean of St. Asaph, among others, wherein juries were deprived of their power to determine whether a writing was a seditious libel, were described by one noted English historian as monstrous examples of how liberty of the press can be subverted when the jury is deprived of its power to decide. "Trial by jury was the sole security of the press; and it was found to have no place in the law of England." 2 May, *Constitutional History of England* (Holland Ed. 1912) 11.

Holdsworth, discussing with approval the passage of Fox's Libel Act granting juries the right to render general verdicts in all libel cases, observed: "It was realized that, if the functions of the jury in a prosecution for libel were enlarged, . . .; if, in other words, they had the right to give a general verdict upon the whole matter; there would be abundant security that the law would be so administered that it harmonized with the political ideas and the public opinion of the day." X *History of English Law* (Lond. 1938) 673. Holdsworth also cites the debates in the Commons on the issue wherein it was stated: "So changeable is the nature of a libel, so much does it assume the chameleon and suit its color to the complexion of the times! In short its libellous quality is founded entirely on popular opinions. There is no other standard by which it can be measured or ascertained. Who then, so proper as the people to determine the point?" X Holdsworth, *supra*, at 689.

Early American history also sheds light on the issue herein involved. From the viewpoint of the liberal colonists in America in the early 1700's, "freedom of the press involved both absence of previous restraint and the right to a jury trial". I *Government and Mass Communications* (1957) 71. Professor Chafee was thus led to observe that "a jury trial for restrictions on the sale of books is probably required by both sound policy and the constitutional guaranty of freedom of the press". *Free Speech in the United States* (1941) 539. Support for this view comes also from a noted student of American constitutional history. "Those who framed the First Amendment placed great emphasis upon the value of a jury of citizens in checking

government efforts to limit freedom of expression." Emerson, "The Doctrine of Prior Restraint", in 20 L. and Cont. Prob. 648, 657 (1955).

Andrew Hamilton, in his argument to the jury in the Zenger trial [*The Trial of John Peter Zenger (1734) and the Freedom of the Press,* prepared by the Works Projects Administration (1940)], pointed out that one of the reasons for the abolition of the Court of Star Chamber was that "the people of England saw clearly the danger of trusting their liberties and properties to be tried, even by the greatest men in the Kingdom, without the judgment of a jury of their equals" (*Ibid.* at 47). Hamilton urged that "jurymen are to see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings, in judging of the lives, liberties or estates of their fellow-subjects" (*Ibid.* at 49). And on the occasion when Mr. Hamilton was presented with the Freedom of New York after the acquittal of Zenger, the scroll presented to him by the common-council extolled "his learned and generous defense of the rights of mankind, and the liberty of mankind, and the liberty of the press" (*Ibid.* at 58).

When in 1789 James Madison rose to address the first House of Representatives, he urged upon the House certain proposed amendments to the Constitution which would "expressly declare the great rights of mankind secured under this Constitution". 1 *Annals of Congress* (1834) 432. Madison affirmed: "Trial by jury cannot be considered as a natural right, but a right resulting from a social compact, which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-

existent rights of nature" (*Ibid.* at 437). He warned that "the State Governments are as liable to attack these valuable privileges as the General Government is, and therefore ought to be as cautiously guarded against" (*Ibid.* at 441). See, *New York Times Co., et al. v. Sullivan,* 376 U.S. 254; *Garrison v. Louisiana,* 379 U.S. 64.

(e) If First Amendment freedoms are to be safeguarded in "obscenity" proceedings; if freedom of expression is to "be ringed about with adequate bulwarks" (*Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 66), then, it is submitted, only a jury representing a cross-section of the community should be empowered to decide what the community does or does not tolerate. A jury, in accordance with "our basic concepts of a democratic society and a representative government" is required to be a "body truly representative of the community", a "cross-section of the community", serving only "as instruments of public justice" and not as the "organ of a special class". *Glasser v. United States,* 315 U.S. 60, 85-86.

In *United States v. Kennerly,* 209 Fed. 119 (D.C. N.Y. 1913), Judge Learned Hand expressed his now familiar dictum: "Should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now?" (209 Fed. at 121.) In Judge Hand's view, if literature were to be made subject to the "social sense of what is right", then a "jury should in each case establish the standard" (209 Fed. at 121). "A jury", stated Judge Hand, "is especially the organ with which to feel the content comprised with such words at any given time, but to do so they must be free to follow the collo-

quial connotations which they have drawn up instinctively from life and common speech." (209 Fed. at 121.)

In *United States v. Levine,* 83 F. 2d 156 (2d Cir. 1936), Judge Hand again stressed the requirement of a jury in obscenity actions. "Thus 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premise, but really a small bit of legislation *ad hoc,* like the standard of care" (83 F. 2d at 157). Again, during discussion of the Tentative Draft by the American Law Institute, Judge Hand, expressing concern about the "absolute unknown contour" of the obscenity concept, stated that "we must leave it to the jury to say, is this obscene". American Law Institute, *Proceedings, 34th Annual Meeting* (1957) 190-191.

The American Law Institute stated in 1957:

> "Under our definition of obscenity a court could not instruct that a given writing is obscene as a matter of law, since elements other than the nature of the material itself enter into the determination, particularly the question of customary freedom of expression. *Jury trial in this field has the merit of requiring unanimous condemnation by this sample of the general population on issues which seem to be peculiarly within their competence;* what is the predominant appeal of the material to the ordinary adult, and what are the outer limits of custom in description or representation of sexual matters." A.L.I. *Model Penal Code,* Tent. Draft No. 6 (May 6, 1957) 47. (Emphasis added.)

A judge is not a representative of the community —he is a representative of an arm of Government, the judicial arm; and the jury, as Madison made clear, was intended to act as a barrier against "all forms and departments of Government" where the people's right to know was at stake in any dispute between the Government and individual citizens. A very strong tradition is opposed to the notion that a single judge should be able to suppress any book or periodical or work of art. 1 *Government and Mass Communications* (1947) 218.

Moreover, a judge does not in fact represent a cross-section of the community; he represents, at best, only his own group. "The division of the community into groups becomes less serious if several groups are represented on the jury. In the vague field of obscenity, a single judge must struggle hard to avoid using only the standard of his own group." (*Ibid.* at 220.)

Nor is a judge likely to know the extent of community toleration. "Twelve men in the street are familiar with the amount of frankness that Tom, Dick and Harry will stand, more so than a judge, who is somewhat set apart from the regular run of people by the seclusion and intense preoccupations of his work. . . . A judge in his study surrounded by books may readily get scared about the dangers of the printed page, whereas jurors can be led to consult their own experience and see whether they ever knew anyone who was ruined merely by what he read." (*Ibid.* at 221.)

(f) The court below held that a jury trial was not required in the case herein "by the First, Seventh and Fourteenth Amendments to the Federal Constitution

and the standards for judging obscenity enunciated by the United States Supreme Court". (App. A., p. 6).

It must be constantly kept in mind, it is submitted, that the proceedings herein were initiated to suppress a writing ordinarily protected from suppression by the provisions of the First Amendment. The framers of the Bill of Rights did not intend to adopt "common law" concepts with respect to freedom of expression; these common law principles were in many respects "rejected by our ancestors as unsuited to their civil or political conditions". *Grosjean v. American Press Co., Inc.*, 297 U.S. 233, 249. See, 1 *Annals of Congress* (1834) 436; Madison, "Report on the Virginia Resolution", 4 *Elliot's Debates* 546, 561-567.

Since the State's power to suppress obscenity is limited by the constitutional protections for free expression, and since, it is submitted, the requirement of a jury trial is integral to the "contemporary community," "prurient interest" and "social importance" tests for judging obscenity, it does not meet the issue to assimilate common law rules, or the non-existence of common law precedent, to a prosecution of books in the United States, where history, tradition and a written constitution dictate a different resolution of the issue. *Cf., Smith v. California*, 361 U.S. 147, 152-153; *Marcus v. Search Warrants of Property etc.*, 367 U.S. 717, 730-731; *A Quantity of Copies of Books, et al. v. Kansas*, 378 U.S. 205, 211-212. As Madison stated: "The state of the press, therefore, under the common law cannot . . . be the standard of its freedom in the United States." "Report on the Virginia Resolutions" in 4 *Elliot's Debates* at 570. Thus, the standards governing procedures for determining wheth-

er a book is or is not obscene within free speech and press guarantees under the Constitution are different from the standards ordinarily employed in other civil or criminal proceedings. In the former case, it is the standards of the Bill of Rights which govern and compel a jury determination of the decisive issues.

In a fundamental sense, there is involved herein the right of the public to read, the right of the people to know. If any expression is to be denied access to the marketplace of ideas, at the very least, it is submitted, a self-governing society should be permitted to make its own decision as to whether such communication shall be barred.[5]

2. The book *Sin Whisper* by Alan Marshall is not obscene and is entitled to the protection of the free speech and press provisions of the First and Fourteenth Amendments to the United States Constitution. The courts below misconceived and failed to properly apply the standards enunciated by this Court for judging the alleged obscenity of a writing.

The book *Sin Whisper* has ideas of social importance; does not exceed contemporary community standards, in the Nation as a whole, in the depiction of sex; and does not appeal to a shameful or morbid interest in sex. Measured by constitutional standards, the book is not obscene, and petitioner invokes the constitutional judgment of this Court with respect thereto. *Jacobellis v. Ohio,* 378 U.S. 184. Since the case herein involves a question of where the line should be drawn between constitutionally protected speech and speech

[5]"The jury is like swing music. Classical theory frowns; the masses applaud. And in a democracy the felt need of the masses has a claim upon the law." 5 Moore, *Federal Practice,* §38.02 at p. 15.

which may be suppressed, petitioner respectfully urges upon this Court "an independent examination of the whole record" so as to assure that the judgment of the court below does not constitute an unlawful abridgment of freedoms of speech and press. *New York Times Co., et al. v. Sullivan,* 376 U.S. 254, 284-286; *Estes v. Texas,* 381 U.S. 532, 567.*

The standards employed by the Georgia State Literature Commission in attempting to establish that the book herein involved is obscene, adopted by the trial judge, were manifestly erroneous under the Constitution. The Executive Secretary of the Commission, testifying as a witness, deemed a book obscene because it dealt with "illicit sex". The witness conceded that such books as *Madam Bovary* and *Lady Chatterley's Lover* were more candid in the description of sex than the book herein involved. In addition, as a measure of the witness' concept of proper standards for judging obscenity, the witness testified that the Commission intended to bring proceedings against *Lady Chatterley's Lover* as an alleged obscene book. *Cf., Grove Press, Inc. v. Christenberry,* 276 F. 2d 433 (2 Cir. 1960), affirming 175 F. Supp. 488 (D.C. N.Y. 1959). Moreover, although the witness conceded that the book herein had an important moral to convey, still the book must be deemed without constitutional protection according to the Executive Secretary because it did not have any "new, original, or significant" ideas.

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*The record in this case is significantly different from the records in *Ginsburg v. United States,* 383 U.S. 463; and *Mishkin v. New York,* 383 U.S. 502, since there was no evidence presented as to the circumstances of production, sale or publicity, and the trial judge below was merely asked to judge the alleged obscenity of the writing in the abstract. See, *A Book etc. v. Attorney General of Massachusetts,* 383 U.S. 413, 417, fns. 3-5.

The minister offered as a witness by the Commission appeared to believe that the book should have been written differently with more emphasis on the background of the characters, and that the redeeming features of the book were "weak". Without any expertise to support his views, the witness deemed his secluded outlook to be more persuasive than the outlook of the average reader of fiction, with which the witness was entirely unfamiliar. To the witness, the standards for judging obscenity were "the boundaries of decency and good taste".

The only other witness presented by the Commission took as her standard the tendency of a writing "to stir the sexual impulses and stimulate lustful thought". Books to this witness should not emphasize the "sensual" but the "sexual aesthetic". This witness deemed herself disqualified to testify as to whether or not the book appealed to a prurient interest, and her notion of the limits of candor were the "social mores" and "taboos of our society".

On the other hand, the undisputed testimony of an acknowledged expert on behalf of the petitioner herein, who had read extensively books which were generally accepted in the community and found in book stores and public libraries, was that the book herein did have social importance; did deal with a familiar theme, to wit, the search for identity; and that the book clearly did not exceed in candor of description of sex the various books with which the witness was familiar and which were generally accepted and tolerated in the community.

The trial judge rendered no written opinion and relied on the standards and evidence furnished by the

State Literature Commission, conforming his conclusions in the judgment to the pleadings of the Commission. The court below, making no independent constitutional judgment, simply upheld the judgment of the trial judge on "the evidence", adding only that the book is "filthy and disgusting".

It has been held that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read. . . ." *Griswold v. Connecticut,* 381 U.S. 479, 482. "Obscenity", it has been stated, can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment. *New York Times Co., et al. v. Sullivan,* 376 U.S. 254, 269. The fact that the dominant theme of a book deals with some aspect of sex, such as prostitution, adultery, lesbianism or any other "normal" or "abnormal" sexual relation is not sufficient ground for denying such a writing the constitutional protection of the First Amendment. This Court has stated that the guarantees of the Constitution are "not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing". *Kingsley International Pictures Corp. v. Regents,* 360 U.S. 684, 689.

The constitutional protection extends to publications which entertain as well as those which instruct for

"the line between the informing and the entertaining is too elusive for the protection of that basic right". *Winters v. New York,* 333 U.S. 507, 510. The Constitution protects expression without regard "to the truth, popularity, or social utility of the ideas and beliefs which are offered". *N.A.A.C.P. v. Button,* 371 U.S. 415, 445. Nor are books to be condemned because officials deem them "sacreligious"; "prejudicial to the best interests of the people"; "immoral"; "harmful"; "non-educational"; "non-amusing"; or "tending to the corruption of the morals of youth". Moreover, writings are not obscene because deemed by officials of Government to be "dismally unpleasant, uncouth and tawdry". Nor are books to be proscribed because deemed offensive or revolting to a particular reader.[7]

The Georgia statutes, as construed and applied by the courts below, create vague, ambiguous and unascertainable standards and criteria for the suppression of books and other writings as obscene, and they permit arbitrary suppression of speech and press by the State in violation of the protective guarantees of the First and Fourteenth Amendments. The fact of the matter is that the judgments of the courts below are unsupported by competent evidence, and are founded on clearly erroneous interpretations of the constitutional standards for judging obscenity.

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[7] *Jos. Burstyn, Inc. v. Wilson,* 343 U.S. 495; *Gelling v. Texas,* 343 U.S. 960; *Superior Films, Inc. v. Dept. of Education* [*Commercial Pics. Corp. v. Regents*], 346 U.S. 587, reversing 159 Ohio St. 315, 112 N.E. 2d 311 and 305 N.Y. 336, 113 N.E. 2d 502; *Holmby Productions, Inc. v. Vaughn,* 350 U.S. 870, reversing 177 Kan. 728, 282 P. 2d 412; *Butler v. Michigan,* 352 U.S. 380; *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, reversing 289 F. 2d 455 (D.C. Cir. 1961); *Mounce v. United States,* 355 U.S. 180, reversing 247 F. 2d 149 (9 Cir. 1957) affirming 134 F. Supp. 490 (D.C. Wash. 1955).

The undisputed record is that the book herein does not exceed contemporary standards in the depiction or representation of sex, and the undisputed record also clearly reveals that the book has some social value and importance. It clearly cannot be proscribed as being *utterly* without redeeming social value, since not a single witness presented by the Commission could support such a claim. There was never any credible proof presented that the book appeals to a shameful or morbid interest in sex, or that it was patently offensive. See, *United States v. Klaw, et al.*, 350 F. 2d 155 (2 Cir. 1965). Nor was there any attempt by the Commission to rebut the testimony offered by petitioner that the book herein was within the limits of candor generally tolerated by the community as reflected in the many books and bestsellers found in the book stores and libraries of the State of Georgia.

In essence, the book herein has been suppressed, not because it is obscene but because, in the opinion of the Commission and its witnesses, the book tends to communicate to the untutored instead of to the educated; because the book's theme of loneliness and search for identity is derivative and not an "original" idea; because the truth contained in the book is transitory and not "permanent".

The power of a State to suppress "obscenity" should not be used as a gloss, it is submitted, to suppress books and other writings which the State deems inappropriate reading for a vast segment of the community. The First Amendment does not draw a line between educated and uneducated speech. "What is good literature, what has educational value, what is refined public information, what is good art, varies

with individuals as it does from one generation to another. * * * From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values." *Hannegan v. Esquire,* 327 U.S. 146, 157. In a self-governing society, freedom of an adult to read and have access to ideas should not depend upon the literary or intellectual standards determined by the State or its representatives.[8]

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

STANLEY FLEISHMAN,
Counsel for Petitioner.

SAM ROSENWEIN,
HUGH W. GIBERT,
Of Counsel.

[8] "Sometimes it is said that man cannot be trusted with the government of himself. Can he, then, be trusted with the government of others? Or have we found angels in the form of Kings to govern him? Let history answer this question." Jefferson, "First Inaugural Address", quoted in Jones, *Primer of Intellectual Freedom* (1949) 143.

APPENDIX A.

Opinion of the Supreme Court.

In the Supreme Court of Georgia.

23227. Corinth Publications, Inc. v. Wesberry et al.

1. The Constitutional attacks upon Georgia Laws 1963, page 78, need not be considered as that statute is not involved here.
2. The Constitutional attacks upon statutes pertaining to the State Literature Commission (Ga. L. 1953, p. 135; Ga. L. 1958, p. 391; Ga. L. 1964, p. 161) are not meritorious.
3. Denial of the respondent's demand for jury trial was not erroneous.
4. The judgment declaring the literature in question to be obscene was proper.

ARGUED DECEMBER 13, 1945 — DECIDED JANUARY 18, 1966.

Declaratory judgment. Muscogee Superior Court. Before Judge Davis.

Haas, Holland, Freeman, Levison & Gibert, Hugh W. Gibert, Stanley Fleishman, for appellant.

Arthur K. Bolton, Attorney General, Peyton S. Hawes, Jr., Assistant Attorney General, contra.

GRICE, Justice. A proceeding declaring a book to be obscene brings about this appeal.

The litigation began when James P. Wesberry, Hubert L. Dyar and Marcus Calhoun, as members of the State Literature Committion, filed in the Superior Court of Muscogee County a petition seeking a declaration that a book entitled "Sin Whisper" is obscene.

The petition recited that the Commission was created by Georgia Laws 1953, page 135, as amended by Georgia Laws 1958, page 391 and Georgia Laws 1964, page 161; and that the petition for declaratory judgment was brought pursuant to Georgia Laws 1945, page 137, as amended. It named the book, copy of which was attached, as defendant, and designated as respondents the author, Alan Marshall, the publisher, Corinth Publications, both of San Diego, California, and the retail seller and wholesale distributor, both of Columbus, Georgia.

The petition alleged that the Commission had "found the book to contain obscene material . . . [that it] is a literature of obscene nature, composed almost entirely of obscene and repugnant passages devoted to lengthy and vivid accounts of preparation for and acts of sexual promiscuity and misbehavior between its main characters, and that when the entire book is taken or considered as a whole, it has as its predominant appeal prurient interests (i.e., a shameful or morbid interest in nudity, sex, or excretion), going substantially beyond the customary limits of candor in description or representation of such matters."

The prayers of the petition were: a finding of probable cause to believe such literature is obscene, an order for special hearing to show cause; service of the petition and such order; a hearing on the question of obscenity; an adjudication that the book is obscene; and general relief.

The trial court entered an order reciting that it appeared that there was probable cause to believe the literature was obscene, setting the matter for special hearing to determine whether it was obscene and to

show cause why it should not be adjudged obscene, and providing for service of the order.

Only the publisher, Corinth Publications, Incorporated, resisted the proceeding. It interposed an answer and demurrers making constitutional attacks on specified Georgia laws relating to obscenity. It also filed a demand for jury trial. The demurrers were overruled and the demand was refused.

The case proceeded to trial before the judge without a jury, and resulted in a judgment adjudicating that the book is obscene.

The respondent publisher enumerated the following as error: the overuling of its demurrers to the petition; the refusal to hold unconstitutional on their face designated Georgia laws relating to obscenity (Ga. L. 1953, p. 135; Ga. L. 1958, p. 391; Ga. L. 1963, p. 78; Ga. L. 1964, p. 161); the refusal of its demand for jury trial; and holdings in the judgment, in stated particulars, that the book is obscene.

1. We first consider the overruling of the respondent's demurrers to the petition.

(a) The initial attack is that Georgia Laws 1963, page 78, is unconstitutional upon its face because it violates freedom of the press as guaranteed by the State and Federal Constitutions. It is not necessary to recite the contentions thus made, because the attack is directed against the wrong target, and for that reason alone must fail. Georgia Laws 1963, page 78, is not involved here. It makes criminal certain conduct with reference to obscene matter and provides punishment therefor. This is a civil proceeding based on other statutes.

(b) The second ground of challenge is that the activities of the State Literature Commission, as prescribed by Georgia Laws 1953, page 135; Georgia Laws 1958, page 391; Georgia Laws 1964, page 161; and Georgia Laws 1963, page 78, supra, constitute prior censorship in violation of the freedom of press guaranties of the State and Federal Constitutions. This challenge cannot be sustained. As just pointed out, Georgia Laws 1963, page 78, supra, is not involved. Furthermore, the relevant statutes do not provide for any restraint or delay in the publication of literature, but authorize remedial action *after* publication.

(c) The third contention is that, in view of the first and second, referred to above, the petition and the entire procedure should be declared null, void and of no effect. The rulings made in (a) and (b) control adversely here.

2. The enumeration of error complaining of the trial court's refusal to hold these statutes unconstitutional on their face is, in view of the rulings in Division 1, not meritorious.

3. The trial court's denial of the respondent's demand for a jury trial was not erroneous.

(a) As to the first basis relied upon, the right to jury trial under the Georgia Constitution (Art. VI, Sec. XVI, Par. I; *Code Ann.* § 2-5101), no such right is provided in the situation here. That Constitutional provision, "The right of trial by jury . . . shall remain inviolate . . ." guarantees only "those rights heretofore enjoyed at common law in civil and criminal cases. . . ." *Porter v. Watkins,* 217 Ga. 73, 74 (121 SE2d 120). Since the proceeding here in-

volved did not exist at common law, no right to trial by jury is afforded by this Constitutional provision.

(b) Neither was a jury trial required by any of the statutes relied upon here.

The 1964 amendment to the State Literature Commission Act (Ga. L. 1964, p. 161; *Code Ann.* §26-6306a.1) authorizing a declaratory judgment as to obscene material, contains no right of trial by jury. In fact, the word "jury" does not even appear in that Act. The trial provided therein is by the court, instead of by a jury.

Nor does the Declaratory Judgment Act (Ga. L. 1945, p. 137, Ga. L. 1959, pp. 236, 237; *Code Ann. Ch.* 110-11) afford the right to jury trial in the instant proceeding. Reference in the petition to such statutes was not necessary.

The purpose of the declaratory judgment procedure created by such 1945 and 1959 statutes is to relieve from uncertainty and insecurity by providing prior guidance. It is not confined to any one area where such guidance is needed, and relief in addition to a declaration may be granted. In short, it is a general procedure.

The 1964 Act (Ga. L. 1964, p. 161), providing for an adjudication or declaration that literature is obscene, is a special procedure, independent of such general procedure. It amended, not the 1945 or 1959 declaratory judgment statutes, but those relating to the State Literature Commission. Ga. L. 1953, p. 135; Ga. L. 1958, p. 391. Its use is restricted to one area only, obscene literature.

It created an expeditious remedy with special procedures designed to combat the problem of obscenity. It provided for such matters as in rem action against the literature itself, designation of respondents, preliminary examination and disposition, a hearing between 20 and 25 days hence, notice to defend, service by mail upon nonresident respondents, forthwith determination if in default, and adjudication that the matter is obscene. This procedure, as we construe the statute, provided a remedy administered only by the trial judge who makes the determination as to obscenity. It is an alternative remedy to that of injunction against obscene literature, which already existed by the 1953 and 1958 State Literature Commission statutes, supra, and which require the usual time procedures and a jury trial.

(c) Nor was a jury trial required here by the First, Seventh, and Fourteenth Amendments to the Federal Constitution and the standards for judging obscenity enunciated by the United States Supreme Court. According to Roth v. The United States and Alberts v. California, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1953), the test of obscenity is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." (P. 489.) See also, Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964). It is insisted that only by a jury trial can these standards be constitutionally ascertained.

This contention is not valid.

It is not supported by any holding by the Supreme Court of the United States. Support from that Court is

sought from several statements made in concurring or dissenting opinions in cases where no issue of jury trial was actually made. On the other hand, statements are found in concurring and dissenting opinions of that court which indicate the view that trial by jury is not necessary, i.e., that obscenity is a question of law not fact, that it is a mixed question of law and fact, that it is a question of "constitutional judgment," and that an appellate court must in each case make its own independent judgment on the issue. See such cases as Roth and Alberts, 354 U.S. 476, supra; Manual Enterprises, Inc. v. Day, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639; Jacobellis v. Ohio, 378 U.S. 184, supra. For a comprehensive presentation of Supreme Court cases on obscenity, see United States v. Klaw, 350 F.2d 155 (CCA 2).

Furthermore, insofar as we can ascertain, all appellate courts which have dealt with the issue of the right to jury trial in civil obscenity proceedings have ruled against them. Those courts apparently have not regarded as valid the contention made here that a jury is required by the Federal Constitution to ascertain community standards. See State of Kansas v. A Quantity of Copies of Books, 191 Kan. 13 (379 P2d 254) (reversed by Supreme Court of the United States upon other grounds, 378 U.S. 205 (84 SC 1723, 12 L.E2d 809); Rachleff v. Mahon (Fla. App. 1960) 124 So.2d 878; Gerstein v. "Pleasure Was My Business," (Fla. App. 1961) 136 So.2d 8; Zeitlin v. Arnebergh, 59 Cal. 2d 901 (383 P2d 152) (certiorari denied by the Supreme Court of the United States).

For the foregoing reasons, we conclude that there was no error in refusing the respondent's request for a jury trial.

4. The final enumeration of error is the judgment and decree declaring that the book in question is obscene. Such declaration is as follows:

"1. That the book entitled 'Sin Whisper' is composed substantially of lengthy, detailed, and vivid accounts of preparation for and acts of normal and abnormal sexual relations between and among its characters; and, 2. That the book taken and considered as a whole, has as its predominant appeal, the arousing of prurient interests in the average man of our national community; and, 3. That the book taken and considered as a whole has no redeeming literary or social value or importance; and, 4. That the book taken and considered as a whole goes substantially beyond the customary limits of candor in description and representation of its subject matter; and, 5. That the book, judged as a whole by Georgia Statutory Standards and Constitutional standards established by the United States Supreme Court, is obscene."

This adjudication is amply supported by the evidence. In our view, the book is filthy and disgusting. Further description is not necessary, and we do not wish to sully the pages of the reported opinions of this court with it.

We find no error in the proceedings.

Judgment affirmed. All the Justices concur.

APPENDIX B.

Judgment of the Supreme Court.

Supreme Court of Georgia.

Atlanta, January 18, 1966

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

Corinth Publications, Inc., v. James P. Wesberry et al.

This case came before this court upon an appeal from the Superior Court of Muscogee County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

All the Justices concur.

Bill of Costs, $30.00

APPENDIX C.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The provisions of the Seventh Amendment to the United States Constitution are:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

3. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. The pertinent provisions of the Georgia obscenity statutes [criminal] (Ga. L. 1963, pp. 78-79, Ga. L. 1965, pp. 488-489, Ga. Code Ann. 26-6301, 6301.2) are as follows:

> "26-6301. (385 P. C.) Sale, etc., of obscene pictures, books, etc.—Any person who shall knowingly bring or cause to be brought into this State for sale or exhibition, or who shall knowingly sell

or offer to sell, or who shall knowingly lend or give away or offer to lend or give away, or who shall knowingly have possession of, or who shall knowingly exhibit or transmit to another, any obscene matter, or who shall knowingly advertise for sale by any form of notice, printed, written, or verbal, any obscene matter, or who shall knowingly manufacture, draw, duplicate or print any obscene matter with intent to sell, expose or circulate the same, shall, if such person has knowledge or reasonably should know of the obscene nature of such matter, be guilty of a felony, and, upon conviction thereof, shall be punished by confinement in the penitentiary for not less than one year nor more than five years: Provided, however, in the event the jury so recommends, such person may be punished as for a misdemeanor. As used herein, a matter is obscene if, considered as a whole, applying contemporary community standards, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion.

* * *

"26-6301.2. Same; necessity for adjudication and notice of obscenity before prosecution.—No person shall be prosecuted for the violation of the provisions of this law [§§ 26-6301.1, 26-6301.2] unless and until said literature shall have been previously declared obscene by a court of competent jurisdiction in accordance with the provisions of sections 26-6306a.1 and 26-6306a.2, and unless such person has received notice from the State Literature Commission by registered mail that the pornographic or other material is obscene as defined by the provisions of section 26-6301."

5. The provisions of the Georgia obscenity statutes [civil] (Ga. L. 1953, pp. 135-136, Ga. L. 1958, pp. 391-394, Ga. L. 1964, pp. 161-164, Ga. Code Ann. 26-6301a to 6309a) are as follows:

"26-6301a. Definitions. — For the purposes of this Chapter:

(a) 'Literature' shall mean any book, periodical, magazine, pamphlet, paper, drawing, lithograph, engraving, photograph, or picture.

(b) 'Obscene literature' shall mean any literature which if, considered as a whole, its predominant appeal is prurient interests, i. e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters.

"26-6303a. Meetings; per diem; quorum; central office; executive secretary; restriction on expenditures.—The commission shall meet monthly and at such other times as may be necessary for the performance of their duties, not to exceed 60 days in any one calendar year. Each member shall receive $20 per diem, plus any actual and necessary expenses in connection with attendance at meetings. The meetings of the commission shall be held at any place most desirable within the State of Georgia for the transaction of the business of the commission. Two members of the commission shall constitute a quorum for the transaction of business. The commission is hereby authorized to establish a central office for the conduct of its business. The commission shall elect one of its number to serve as executive secretary, who shall

supervise the gathering of evidence, the conducting of such investigations as may be necessary to carry out the provisions of this Chapter, and supervise the employees of the commission. The executive secretary shall be compensated in an amount to be fixed by the commission not to exceed $6,000 per year. The executive secretary and the employees of the commission are hereby authorized to perform their duties on a full time basis, and shall not be restricted to the time limitation provided for hereinbefore: Provided, however, that the commission shall not expend more than $30,000 in any one year.

"26-6305a. Employment of personnel; duties; compensation.—The commission shall employ such personnel as it deems necessary to assist it in conducting investigations into the sale of obscene literature, to gather evidence, to present evidence to the commission and to the solicitors general of this State, and to assist the commission in the performance of its duties. Such personnel shall serve at the pleasure of the commission, and compensation therefor shall be fixed by the commission.

"26-6306a. Restraining order or injunction to prevent distribution; notice; jurisdiction; surrender or seizure of materials.—(a) Where the commission, either through their investigations, hearings, or from evidence furnished to them by citizens of this State, finds any literature containing evidence of obscene material, the said commission is hereby authorized to institute an action, in its own name, as it may be deemed necessary and proper to enjoin the sale, distribution, or exhibition of said ob-

scene literature within the State of Georgia, without regard to whether the same would constitute a nuisance under general law, and without regard to whether an adequate remedy exists at law. No petition for ex parte or temporary order shall be considered by any court without at least one day's notice to the respondent. In the event a restraining order or injunction is granted under this Chapter, the court shall grant the respondent a reasonable time to comply therewith. The superior courts of this State shall have jurisdiction of any such action notwithstanding any other provision of law on the subject.

"(b) In the event that a final order or judgment of injunction be entered in favor of the commission and against the person, firm or corporation sought to be enjoined, such final order may contain a provision directing the person, firm or corporation to surrender to the sheriff or other law enforcement agencies of the county in which the action was brought, or of the State, the said obscene literature and such sheriff or other law enforcement agency may be directed to seize and destroy the same.

"(c) In any action brought as herein provided the commission shall not be required to file any undertaking before the issuance of an injunction order provided for in paragraph (a) hereof.

"26-6306a.1. Declaratory judgment to determine obscenity; procedure; notice of determination.—(a) When the commission, either through their investigations, hearings, or from evidence furnished to them by citizens of this State, finds any litera-

ture containing obscene material, the said commission is hereby authorized to institute an action, in its own name, as it may deem necessary and proper to obtain a declaratory judgment that the same is obscene, without regard to whether an adequate remedy exists at law. The superior courts of the counties in which general jurisdiction to hear such actions is vested shall have such jurisdiction to hear the actions provided for herein.

"(b) The action described in subsection (a) hereof shall be commenced by filing with the superior court a complaint to which shall be attached as an exhibit a true copy of the allegedly obscene literature, and which complaint shall:

"(1) Be directed against and name as defendant the allegedly obscene literature by name and description;

"(2) Allege its obscene nature;

"(3) Designate as respondents and list the name and address, if known, of its author or publisher, and may further name any person sending or causing it to be brought into this State for sale or commercial distribution, and any person in this State preparing, publishing, selling, exhibiting or distributing it, or giving away or offering to give it away, or possessing it with intent to sell or commercially distribute or exhibit or give away or offer to give it away who shall be bound by this action;

"(4) Pray for an adjudication that it is obscene.

"(c) Upon the filing of the complaint described in subsection (b) hereof, the commission shall pre-

sent the same, including the exhibits thereto, as soon as practicable to the court for its examination. If there is no probable cause to believe that the literature described in the complaint is obscene, the court shall dismiss the complaint. If the court finds probable cause to believe such literature is obscene, it shall enter an order setting the matter down for special hearing at a date not less than 20 nor more than 25 days after its service, then and there to be heard, directing the service of a copy thereof, together with a copy of the complaint upon such literature and upon each of the respondents named in the complaint: Provided, however, if the respondents shall fail to file with the court a notice of intention to defend such action 10 days after having been served with a copy of the complaint, the court shall be at liberty to proceed with the appropriate action to declare such literature as obscene. Service shall be made upon such literature at its place of publication or its editorial office as shown therein. Service of such order or any copy thereof may be made in any manner provided by law, and in the case of such literature published or edited outside the State of Georgia, and of any nonresident respondent, by registered mail directed to the literature or respondent to be served at the address shown in the complaint. Proof of such mailing shall be deemed to be prima facie evidence of service of such order of a copy thereof upon the literature or any respondent.

"(d) In the event there is a wholesale distributor, as defined herein, in Georgia of the named literature, a copy of the complaint and order shall

be served upon such wholesale distributor at its principal place of business:

"(1) As used herein, the term 'wholesale distributor' shall mean any person, firm or corporation authorized to do business in Georgia in the business primarily of representing publishers and/or National distributors of printed matter as wholesalers of said matter of those persons, firms, or corporations which sell directly to the consuming public.

"(2) In the event there is more than one wholesale distributor of the named literature in the State, the service required in subsection (d) hereof shall be deemed to have been complied with when service is made on any one such wholesale distributor.

"(e) On or before the return date specified in the order, the literature and each respondent may file answers or other defenses. The court may, by order, permit any person to appear and file and answer as amicus curiae. If no answer or other defense is filed on or before the return date specified in the order, the court may forthwith determine whether the literature is obscene and enter an appropriate judgment. Upon the expiration of the time for filing answers and other defenses, the court may, upon its own motion, or upon the application of any party, set a date for the trial of the issue joined, said date being at least 20 days but not more than 25 days from the date of service of the complaint.

"(f) The commission is charged with the responsibility of sending notice to all persons, firms or corporations in the State affected by or who could

be affected by the court's determination that the named literature is obscene. Such notice shall be by mail and shall specify the literature found obscene by title and description and the date of the adjudication. Any person to whom such notice is mailed shall be presumed to have knowledge of the obscenity of the literature named. Notice of such determination shall also be transmitted to the various solicitors general throughout the State.

"26-6306a.2. Retail dealer relieved of liability upon proper notice to wholesaler.—The retail dealer shall be relieved of any liability under this law [§§26-6306a.1, 26-6306a.2] provided he notifies the wholesaler in writing not to deliver any further isues of specified publication.

"26-6308a. Issuance of subpoenas; procedure upon failure to comply.—The commission shall have the power in reference to its hearings to issue subpoenas. Upon failure of any person to respond to such subpoena, the commission shall certify the matter to the superior court as other cases of contempt made and provided by law.

"26-6309a. Furnishing solicitor general with information; recommendation of prosecution.—The commission may furnish the solicitors general of this State with information, evidence and facts, regarding its hearings and procedures under this Chapter, and in cases where a person, firm or corporation, wilfully and knowingly sells, distributes, exhibits, or possesses, any obscene materials hereinbefore described, the commission may recommend prosecution of such person, firm or corporation under the criminal laws of this State respecting ob-

scene literature. The grant of a restraining order or injunction against one respondent under this Chapter shall in no way be declared or held to be notice to any other person, firm or corporation not a party to the said injunction suit. This Chapter, furthermore, shall in no way limit or restrict any solicitor general from the performance of duties in prosecuting any person, firm or corporation under the criminal laws of this State respecting obscene literature."

6. The provision of the Georgia statutes generally authorizing jury trial in equitable proceedings (Ga. L. 1876, p. 105, Ga. Code Ann. 37-1104) is as follows:

"37-1104. (5422) Special verdict; charge of court; written decree upon.—In the trial of any proceedings for equitable relief, upon the request of either party to said cause, made after the same is called for trial and before the beginning of the introduction of evidence, the presiding judge shall instruct and require the jury to find a special verdict of the facts only, and shall inform the jury what issues of fact are made by the pleadings. Upon the special verdict of facts, so rendered, the presiding judge shall make a written judgment and decree in said cause under the law applicable to the same."

7. The provisions of the Georgia statutes generally authorizing jury trial in actions for declaratory judgments (Ga. L. 1945, p. 137, Ga. L. 1949, pp. 236, 237, Ga. Code Ann. 110-1101 to 1103) are as follows:

"110-1101. Power of superior courts to declare rights and legal relations; cases in which power can be exercised; effect of other adequate remedy.—

"(a) In cases of actual controversy the respective superior courts of the State of Georgia shall have power upon petition, or other appropriate pleading, to declare rights, and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

"(b) In addition to the cases specified in paragraph (a) of this section, the respective superior courts of the State of Georgia shall have power upon petition, or other appropriate pleading, to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, in any civil case in which it appears to the court that the ends of justice require that such declaration should be made, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

"(c) Relief by declaratory judgment shall be available notwithstanding the fact that the complaining party has any other adequate legal or equitable remedy or remedies.

"110-1102. Further relief. Damages; injunction; mandamus; quo warranto; service of process; procedure.—(a) Further plenary relief, legal or equitable, including but not limited to damages, injunction, mandamus, or quo warranto, may be sought in a petition seeking declaratory judgment, and in such case, said action shall be governed as to process, service and procedure by the provisions

of section 110-1104. In all such cases, the court shall award to the petitioning party such relief as the pleadings and evidence may show him to be entitled, and the failure of such petition to state a cause of action for declaratory relief shall not affect the right of such party to any other relief, legal or equitable, to which he may be entitled.

"(b) The court, in order to maintain the status pending the adjudication of the questions or to preserve equitable rights, may grant injunction and other interlocutory extraordinary relief, in substantially the manner and under the same rules applicable in equity cases.

"110-1103. Jury trials; special verdicts; instructions by court.—When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, unless jury trial be waived, such issues shall be submitted to a jury of 12 in the form of interrogatories, with proper instructions by the court whether a general verdict be required or not. Such instructions by the court shall in all respects be governed by the laws of Georgia relating to instructions or charges by a court to a jury."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 227

CORINTH PUBLICATION, INC.,

Petitioner

v.

JAMES P. WESBERRY, HUBERT L. DYAR and MARCUS CALHOUN, as Members of the Georgia State Literature Commission,

Respondents

BRIEF OF RESPONDENTS

Pursuant to an Order of this Court requesting that the Attorney General of Georgia file a brief in response to Petitioner's Writ of Certiorari, Respondents now file their brief in opposition to the Petition for Writ of Certiorari.

I.

STATEMENT OF CASE

Respondents adopt Petitioner's statement of the case as being sufficient to present the questions before this Court. However, Respondents believe that a complete

review of the record in this case would enable this Court to better judge the trial proceedings in this case.

II.

REASONS FOR DENYING THE WRIT

1. THERE IS NO CONSTITUTIONAL GUARANTY OR STATUTORY REQUIREMENT OF A JURY TRIAL IN THIS ACTION.

The Petitioner cites numerous provisions of both the Georgia and United States Constitutions as substantiating its contention that there exists a constitutional mandate of a jury trial in civil obscenity actions. The Respondents submit that each and every provision is inapplicable.

While the Respondents subscribe wholeheartedly to the coveted concept of trial by jury, we submit that it is well-established that a jury determination does not provide a patented formula for unerring justice, and is not to be required in all cases.

Article I, Section I, Paragraph XV of the Georgia Constitution sets forth the guaranty of freedoms of speech and press but states that the individual is responsible for the abuse of that liberty. We recognize this as one of our most valued freedoms, but submit that obscenity is an abuse of this cherished liberty and in any event it guarantees no right to jury trial and can rise no higher than the express guaranty found in Article VI, Section XVI, Paragraph I of the Constitution of the State of Georgia:

"The right of trial by jury, except where it is

> otherwise provided in this Constitution, shall remain inviolate, but the General Assembly may prescribe any number, not less than five, to constitute a trial, or traverse jury except in the superior court."

Therefore, if the above constitutional provision contains no right to jury trial, reliance may not be placed in the Constitution for the Petitioner's contentions.

One of the earliest, and still the most incisive and authoritative explanations of the right to jury determination is found in *Flint River Steamboat Co. v. Foster*, 5 Ga. 194 (1848) in which the Court held at 207-208:

> "The provision in our State Constitution, that trial by jury, as heretofore used, shall remain inviolate, means that it shall not be taken away, as it existed in 1798, when the instrument was adopted, *and not that there must be a jury in all cases.*" (Court's emphasis).

The rational of this holding in a civil case was strongly stated at 206:

> "And while it is undoubtedly true, that the provisions, both of the National and State Constitutions, respecting this institution, apply to *civil cases*, still it cannot be denied, that they were mainly and primarily intended to protect inviolate, the trial by jury, in *criminal prosecutions*. And courts will watch with more jealousy, any departure from, or trespass upon trial by jury in the *latter* class of cases, than the *former*." (Court's emphasis).

The Respondents are unaware of any comparable common law action which would bring the present case

within the ambit of the constitutional guaranty and submits the burden was upon the Petitioner to point out a common law basis if one existed.

As an added safeguard, it was provided also in *Flint River Steamboat Co. v. Foster, supra* at 208:

> "An act which merely authorizes a judgment to be rendered, without the intervention of a jury, is not on that account unconstitutional; *more especially, where it guarantees this right ultimately, as in this case.*" (emphasis added).

It is the contention of the Respondents that jury trial is *ultimately* guaranteed in this type proceeding as the declaratory judgment action is merely an incident to eventual criminal proceedings.

If the standard to be applied were of a local community, the Respondents could possible accept the Petitioners constitutional argument for guaranteeing a jury trial. However, it was held in *Jacobellis v. Ohio,* 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964) that the "community" referred to in *Roth v. United States,* 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 was the "national community." It would be legal nonsense to attribute to a jury the sophistication necessary to recognize and apply "national standards." In addition, it is the contention of the Respondents that the determination of "obscenity" is not in reality a factual determination but rather a determination made possible only by close scrutiny of court decisions by one skilled in reading and interpreting such decisions. It is only in this way that "national community" standards can be ascertained. In summary, we submit that we are dealing with a hybrid, factual-legal question which partakes mostly of legal, ingre-

dients. A jury functions best when it deals with the resolution of disputed tangible facts and intangible facts and motivations inherent in every member of our society. This is not such a case.

In *Kingsley Books v. Brown*, 354 U.S. 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469 (1957), this Court had before it the question whether the defendant in a New York injunctive action was constitutionally entitled to a trial by jury. In preliminary remarks, the court observed that New York had both a criminal statute and an injunctive proceeding both designed to restrict the distribution of obscene publications and while the injunctive proceeding was much more lenient in that the injunction served as a warning before imprisonment, the court could not even hold that direct proceedings under the criminal statute required a jury trial. As this Court stated:

> "Of course, the Due Process Clause does not subject the States to the necessity of having trial by jury in misdemeanor prosecution."

This Court then observed that a judicial condemnation for obscenity under the injunctive proceeding is certainly less restrictive of freedom of expression than a conviction for a misdemeanor. It is obvious that the Georgia Declaratory judgment proceeding is even less restrictive than the New York injunctive proceeding in that no criminal sanctions are imposed automatically upon continuing the sale of the particular publication.

Ga. L. 1964, pp. 161-165, provides for the institution of declaratory judgment actions by the State Literature Commission to determine whether a book be obscene. The act is absolutely devoid of any reference to

jury trial. Therefore, it is necessary to examine the act with a view to ascertaining the legislative intent.

The Commission, after determining any publication to be obscene, may institute action for a restraining order or injunction (*Ga. L. 1958*, p. 393), or it may institute a declaratory judgment action (*Ga. L. 1964*, p. 161), each of the above procedures seeking the same result — an adjudication that the particular literature is obscene. Since there is a statutory provision for a jury trial in actions for permanent injunction and since criminal sanctions can accrue without further hearing as the question of obscenity upon failure to comply with the injunction it would appear reasonable to presume that the new declaratory judgment provisions were intended to place a buffer between outright criminal proceedings and factually final civil proceedings.

It is apparent that another principal legislative purpose in enacting the above-stated civil action was to provide a speedy adjudication of first impression on the obscenity of the particular publication in order to supply the necessary element of scienter (*Smith v. California*, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205) in any subsequent criminal actions brought for selling obscene literature (*Ga. Code Ann.* Section 26-6301). Thus, it can be seen that the declaratory judgment action is an added precaution designed to fully protect the seller from criminal prosecution or imprisonment for contempt without prior notice that the literature is obscene and to warn him to cease and desist its sale. As such, the declaratory judgment proceeding is in reality a preliminary step in a criminal proceeding comparable in many ways to a "preliminary hearing" with the added advantage that the offender can purge himself of liability even

after the first adjudication. It will be noted that an individual is not denied a jury trial on the question of the obscene nature of the publication as he is entitled to a jury in any criminal action brought against him. In effect, the law is dealing with an area increasingly complicated by numerous federal court decisions, and represents a valiant attempt to eliminate the necessity of a distributor submitting every dubious piece of literature to an attorney for examination prior to placing it on his bookshelves for sale. The declaratory proceeding is designed to provide a speedy and harmless adjudication of the obscene nature of publications and the imposition of a requirement of jury would hinder the effectiveness of the proceeding and, at the same time, offer no meaningful advantage to either party.

This Court has implied that a jury of laymen is not qualified to decide the issue of obscenity by holding that the question of obscenity constitutes a "constitutional fact" which must be decided de novo by the appellate courts through all levels of appeal. *Jacobellis v. Ohio, supra.*

Therefore, the Respondents submit that it is difficult to imagine the Legislature insisting upon not one, but two, inconsequential jury determinations of fact which must be disregarded by each and every appellate court (State and Federal) which reviews the case.

It is provided that the complaint with exhibits shall be presented to the Superior Court for a determination of probable cause. (*Ga. L. 1964*, p. 162). "If the Court finds probable cause to believe such literature is obscene, it shall enter an order setting the matter down for special hearing at a date not less than twenty (20) nor more than twenty-five (25) days after its service . . .;

provided, however, if the respondents shall fail to file with the court a notice of intention to defend such action ten (10) days after having been served with a copy of the complaint, the court shall be at liberty to proceed with the appropriate action to declare such literature as obscene." (*Ga. L. 1964*, pp. 162-163). "If no answer or other defense is filed on or before the return date specified in the order, the court may forthwith determine whether the literature is obscene and enter an appropriate judgment. Upon expiration of the time for filing answers and other defenses, the court may, upon its own motion, or upon the application of any party, set a date for the trial of the issue joined, said date being at least twenty (20) days but not more than twenty-five (25) days from the date of service of the complaint." (*Ga. L. 1964*, p. 164).

Nowhere in this very detailed procedure is a jury trial directed but rather the time limitations pertaining to the trial of the case inveigh against the application of established procedure for placing a matter before a jury. In short, it is our contention that this is "declaratory judgment" in the descriptive sense and therefore does not compel the application of rules of "The Declaratory Judgment Act."

In our research, we have found few obscenity cases in which the question of the right to jury trial was put in issue, but in every case in which the question was adjudicated, the court found that there was no right to a trial by jury.

In *State of Kansas v. A. Quantity of Books*, 191 Kansas 13, 379 P. 2d 254 (1963), reversed on other grounds 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809, the Kansas Supreme Court held:

> "The present case is not a criminal case but a civil case. The appellants are claiming that they had a right to a jury trial. If that were true, appellants would have to point out what form of action at common law formed the basis for the present suit. Both the provision in Section 5 of the Bill of Rights of the state constitution which reads: 'The right of trial by jury shall be inviolate' and Amendment VII of the federal constitution preserve only the right of trial by jury as it existed at common law. This action grows out of a statute, and we know of no basis for it at common law. Therefore, there was no right to a jury trial."

Our neighboring state of Florida provides for a declaratory judgment proceeding similar to Georgia's prior to the institution of criminal proceedings and in *Rachleff v. Mahon,* 124 So. 2d 878 (Fla. 1960) it was argued that the trial of the case by the judge without a jury was a denial of due process. The Court held at 881:

> "We brush this argument aside with the observation that we know of no constitutional or statutory requirement of jury trial in this kind of declaratory decree proceeding, and have not been cited any by appellant. Jury trial of issues under the Declaratory Decree Statute is permissive, but not mandatory, in certain instances."

See also *Gerstein v. Pleasure Was My Business,* 136 So. 2d 8 (1962).

In conclusion Respondents assert that there is no right to a jury trial under this type of proceeding.

2. THE LOWER COURT PROPERLY FOUND THE PUBLICATION *SIN WHISPER* TO BE OBSCENE.

The standards to be applied in determining whether a particular publication is obscene are numerous and increase with each new decision of the United States Supreme Court. It is the position of the Petitioner that each of the standards are mutually exclusive, and that if it can prove compliance with one criterion, the publication cannot be adjudged obscene.

The Respondents submit that the Court need consider only two of the established standards for purposes of this argument although most assuredly all standards are to be applied in the final determination. We make this statement because, although some attempt was made to establish a "social value" of the book, the principal defense was on the grounds that it "did not go beyond the customary limits of candor." *Jacobellis v. Ohio, supra.*

Although the Respondents freely admitted at trial that there were books on the newsstands which were as explicit as *Sin Whisper* in their treatment of sex and indeed more explicit in their use of vulgarities, the Petitioner dwelled at length on reading particularly graphic passages from other publications into the record. The Respondents maintain that this reliance is misplaced and without merit.

We call the Court's attention to two standards: (1) "goes substantially beyond the customary limits of candor" *Jacobellis v. Ohio, supra;* and (2) "utterly without redeeming social value" *Roth v. United States, supra.*

It is the position of the Respondents that many of the

passages read into the record by the Petitioner *do* go beyond the customary limits of candor. We submit that this Court would have found this to be true in such works as *Tropic of Cancer* if the passages stand alone, but it is well-established that the work must be considered as a whole (*Roth v. United States, supra*) and when this is done, it is often found that although certain passages go "beyond the customary limits of candor," they have "*redeeming* social value." Something must be basically inexcusable to be "redeemed." The word is defined in *Webster's New International Dictionary* (2nd Ed., 1934) as "to make amends for; to offset; to atone for; to compensate; as, to redeem an error."

We agree that the Court is not allowed to "weigh" social value against obscene passages. It is a contention that the book *Sin Whisper* is "*utterly without* redeeming social value," and therefore, provides no justification for its blatant appeal to prurient interests.

Our contention is not unique as a United States District Court held in *Grove Press, Inc. v. Christenberry,* 175 F. Supp. 488 (D.C. S.D. N.Y., 1959), Aff'd. 276 F. 2d 433 (2nd Cir., 1960):

> "To be obscene, dominant effect of a book must be an appeal to prurient interest, that is, shameful or morbid interest in sex, and such theme must so predominate that any ideas of redeeming social importance contained by the publication are submerged."

This Court went further than our present position and held that although you do not weigh social value against obscenity, a book can make some feeble attempt at a moral, story, or philosophy, and yet have this substance totally overcome by the obscenities contained

therein. We submit this is a realistic view if we are not to approach the position that a hard core pornographer can publish a book with a two-page introductory chapter stating that the hero or heroine is frustrated and resolves to seek release in sexual experiences; followed by two hundred pages of description of varied and vivid sexual encounters; and concluded by a page stating that "sex doesn't pay."

In short, a book may have a number of vivid and detailed passages dealing with sex, nudity, or excretion and still not be obscene because of the overall literary value of the book. However, we submit that it is erroneous to contend that a particular passage or passages within an otherwise literary work establish the limits of candor for all publications and that another publication without visible or ascertainable literary value may link together a number of such passages and say that it has not gone beyond the limits of candor because a passage in another book is more vivid. In other words, we submit that there is a minimum of literary content that a book dealing almost exclusively with descriptions of sexual activity must possess in order to extricate itself from obscenity.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day, by the United States mail, properly addressed, postage prepaid, served a copy of the within and foregoing brief on the Attorney for the Petitioner, Stanley Fleishman, 1680 Vine Street, Suite 700, Los Angeles, California 90028.

This _____ day of _____, 1966.

HARDAWAY YOUNG, III
Attorney

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

CORINTH PUBLICATIONS, INC. *v.*
WESBERRY ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA.

No. 227. Decided June 12, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Supreme Court of Georgia is reversed.

THE CHIEF JUSTICE would grant the petition and set the case for oral argument.

MR. JUSTICE CLARK would grant the petition and affirm.

MR. JUSTICE HARLAN adheres to the views expressed in his separate opinions in *Roth* v. *United States*, 354 U. S. 476, 496, and *Memoirs* v. *Massachusetts*, 383 U. S. 413, 455, and on the basis of the reasoning set forth therein would affirm.